BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CAROL L. CESSNA	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,041,787
	)	
ACME FOUNDRY, INC.	)	
Self-Insured Respondent	)	

ORDER

The self-insured respondent requested review of the August 9, 2012 Award *Nunc Pro Tunc* entered by Administrative Law Judge Thomas Klein.[1] The Board heard oral argument on December 14, 2012. Kala Spigarelli, of Pittsburg, Kansas, appeared for claimant. Paul M. Kritz, of Coffeyville, Kansas, appeared for the self-insured respondent.

Judge Klein adopted the rating opinion of Dr. Patrick Do, who found that claimant had a 10 percent functional impairment to the whole body, but only attributed 3 percent of claimant's impairment to the work related accident of July 31, 2008. Judge Klein adopted the task loss opinion of Dr. Randall Hendricks, which Judge Klein calculated to be 24 percent, but reduced that by 70 percent, to a 7 percent task loss, to account for claimant's preexisting task loss. Judge Klein awarded claimant a 53.5 percent work disability based on averaging the 7 percent task loss and 100 percent wage loss.

The Board has considered the record and adopted stipulations listed in the Award.

ISSUES

Respondent requests review of Judge Klein's finding that claimant suffered an increased impairment from the July 31, 2008 aggravation of her preexisting disability. Respondent further contends claimant failed to prove she sustained task loss in excess of her preexisting task loss. Further, if the Board finds claimant is entitled to a work disability, respondent requests the Award be modified to account for wages claimant received until she was laid off from respondent and while she received unemployment benefits.

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[1] Judge Klein previously issued an Award dated May 25, 2012. Such Award was basically identical to the Award *Nunc Pro Tunc*. Both parties advised at oral argument that they never received the Award dated May 25, 2012. Neither party voiced any concerns or objections about Judge Klein issuing an Award *Nunc Pro Tunc* roughly 2½ months after the original Award.

Claimant argues she proved she sustained a permanent aggravation of her preexisting condition. Claimant asserts Judge Klein erred in finding she had preexisting functional impairment and in reducing her task loss rating based on preexisting restrictions. Claimant also argues respondent is not entitled to a credit for the unemployment benefits she received after she was laid off.

The issues for review are:

(1) What is the nature and extent of claimant's disability?

(2) Did claimant have a preexisting functional impairment? Was it error to reduce her current impairment rating because of her preexisting condition?

(3) Did claimant have a preexisting task loss? If so, did she prove she sustained a task loss in excess of her preexisting task loss? Was it error for Judge Klein to reduce claimant's task loss percentage based on preexisting task loss?

(4) Should Judge Klein's Award be modified to account for wages claimant received at respondent until she was laid off and/or for the unemployment benefits claimant received after she was laid off?

FINDINGS OF FACT

Claimant's work for respondent involved filing, sanding, gluing and daubing parts weighing 1-25 pounds. She testified her job entailed lifting "upwards of 50 pounds or more."[2] She would have to sit and constantly reach, twist, and push and pull parts.

Claimant was filing parts on July 31, 2008. She reached into a pan of parts and the pan slipped. Claimant slipped over and jerked her lower back and chest area. She felt pain in her lower back and rib cage for a minute, and then the pain stopped. However, by the end of her shift, she told her boss she thought she had been hurt.

Claimant returned to work on August 1, 2008, but was hurting badly. Respondent sent her to the company nurse, who sent claimant home. Claimant was in pain all weekend and called respondent early Monday morning. Claimant saw the company doctor, Dr. Sandhu, on August 4, 2008. Dr. Sandhu returned claimant to work. Claimant testified her boss took one look at her and said there was no way she could work.

Claimant refused to return to Dr. Sandhu for treatment because he told her she had osteoporosis. Claimant, on her own, obtained chiropractic manipulations on six or seven occasions with Dr. Scott Null.

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[2] R.H. Trans. at 15.

Dr. Randall Hendricks, a board certified orthopedic surgeon, examined claimant on November 26, 2008, at the request of her attorney. Claimant complained of low back pain radiating down her left leg and some sensory deficit in her leg and foot. Dr. Hendricks diagnosed claimant as having a low back injury with sciatic type complaints into her leg.

Claimant told Dr. Hendricks that she had prior low back problems. Before ever being injured in respondent's employment in 2008, claimant had a prior low back condition that required MRI studies in 2001, 2002 and 2006. She was under permanent restrictions from her family doctor, Dr. Pandurang Chillal. Claimant testified Dr. Chillal thought she had a herniated disk based on the 2006 MRI. Dr. Hendricks reviewed a May 13, 2006 MRI, which showed claimant had a degenerative L5-S1 disk. Dr. Hendricks suggested claimant have a new MRI.

Dr. Pat Do, also a board certified orthopedic surgeon, examined claimant on February 12, 2009, at respondent's request.[3] Claimant told Dr. Do she had previous back pain. Dr. Do diagnosed claimant as having back pain with some lower left extremity radicular-type symptoms. Dr. Do opined claimant's 2008 accidental injury aggravated her preexisting condition. Dr. Do also recommended an updated MRI scan.

Respondent laid off claimant on February 26, 2009. From the time of her injury until her lay off, claimant worked modified duty with no heavy lifting or hard twisting or turning.

Claimant underwent a lumbar MRI on March 23, 2009. Dr. Do examined claimant on March 31, 2009. Dr. Do interpreted the 2009 MRI as showing moderate degenerative disc disease, a small to medium central disk herniation at L5-S1, a minimal right paracentral disk herniation at L4-L5, and mild facet joint hypertrophy without significant spinal canal stenosis. Dr. Do gave claimant a trigger point injection.

Dr. Do evaluated claimant on April 29, 2009. Claimant reported little relief from the trigger point injection. Dr. Do referred her for three epidural steroid injections.

When Dr. Do saw claimant next on June 30, 2009, she had received two of the three epidural injections. Claimant told Dr. Do she believed the needles had hit her spinal cord, so she refused the third injection. She was not interested in surgery. Dr. Do found she was at maximum medical improvement. Dr. Do released claimant from treatment and indicated she was able to lift/carry up to 10 pounds continuously, 11 to 20 pounds frequently, but no more than 20 pounds; she could push/pull up to 25 pounds continuously, 26 to 50 pounds frequently, and 51-75 pounds occasionally, but no more than 75 pounds; she could occasionally bend, twist or turn at the waist; she could occasionally climb stairs, but not climb ladders; and she could frequently rotate activities and positions.

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[3] On page three of the Award *Nunc Pro Tunc*, Judge Klein refers to Dr. Do as the court's "own examiner." Dr. Do was not a court-ordered physician in this case.

In a letter dated July 20, 2009, Dr. Do provided an impairment rating. Using the AMA *Guides*,[4] Dr. Do placed claimant in DRE Lumbosacral Category III for a 10 percent whole person impairment. Dr. Do estimated 30 percent of claimant's impairment was related to her July 31, 2008 work injury and 70 percent of her impairment was preexisting. Dr. Do testified claimant's 2008 accidental injury resulted in claimant having a 0-5 percent impairment rating to the body as a whole. Such preexisting impairment rating would be based on DRE Lumbosacral Category II as contained in the *Guides*.

Jerry Hardin, a vocational expert, interviewed claimant on March 15, 2010, at claimant's attorney's request. He compiled a list of 19 unduplicated tasks claimant performed in the 15-year period before her July 31, 2008 work-related accident. Claimant told Mr. Hardin she had "temporary permanent restrictions"[5] against lifting more than 20 pounds as a result of a 2002 injury. Claimant told Mr. Hardin the physical demands she had working at respondent before her injury required lifting more than 20 pounds.

In a February 1, 2010 letter, Dr. Hendricks noted the 2009 MRI showed claimant had evidence of degenerative disc disease, as had the 2006 MRI. The 2009 MRI also showed mild bulging at L3-4 and L4-5 and a disc herniation at L5-S1 with impingement of the left S-1 nerve root. Dr. Hendricks opined claimant's work-related accident in July 2008 was the major cause of her disk protrusion. He recommended epidural steroid injections, additional conservative treatment and, depending on results, possibly even surgery.

In his February 17, 2010 letter, Dr. Hendricks rated claimant as having a 13 percent permanent partial impairment to the body as a whole using the *Guides*.

Claimant worked part-time at a filling station, about six hours one day a week, until June 2009. Claimant received $364 in weekly unemployment benefits until April, 2010. The record does not reflect when claimant started receiving unemployment benefits.

Claimant testified she abided by Dr. Chillal's permanent restrictions before and at the time of her July 31, 2008 accidental injury. Claimant's testimony regarding Dr. Chillal's prior restrictions was inconsistent. Claimant initially testified Dr. Chillal's pre-July 31, 2008 restrictions were no lifting over 15-20 pounds, no pushing or pulling anything heavy, and to limit twisting and turning. On redirect examination, claimant testified the only restriction Dr. Chillal gave her before her July 2008 injury was the lifting restriction. She testified Dr. Chillal only imposed the twisting, turning, pushing and pulling restrictions after her July 2008 accident.

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[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[5] Hardin Depo. at 40.

Claimant testified Dr. Do placed more restrictions on her than she had before her July 2008 accident. Claimant did not believe she could perform her job within Dr. Do's restrictions. Claimant acknowledged Dr. Chillal's prior lifting restriction was more restrictive than Dr. Do's lifting restrictions.

In an August 13, 2010 letter, Dr. Hendricks gave claimant permanent restrictions of no lifting in excess of 30 pounds, alternate between sitting and standing based on one hour of standing and 30 minutes of sitting, and no repetitive bending and twisting at the waist.

Dr. Hendricks testified on August 25, 2010. Dr. Hendricks did not review any medical records concerning claimant's previous back problems. He relied on claimant for her history. Dr. Hendricks indicated claimant may have had some prior permanent functional impairment, but he did not know how much, perhaps from 2 to 4 percent.

Dr. Hendricks testified claimant's 2006 MRI showed a bulging disk. He testified claimant clearly had a disk protrusion at the time of her 2009 MRI, worse than the bulging disk on the 2006 MRI films. However, Dr. Hendricks testified he was unable to judge if there had been any significant changes from 2006 to 2009 because the 2006 MRI films he reviewed did not include the axial cuts. In any event, he testified the protrusion was bigger on the 2009 MRI than the 2006 MRI as follows:

> Well, okay. When I looked at the old study from '06, I mean, it didn't look like a big herniation or I would have remarked about that. Then I look at the study from 2009, and I go "Wow. This is clearly different." But if you're wanting to know how much bigger is it, how many cubic millimeters, I'd have to measure it. But it did look bigger.[6]

Dr. Hendricks reviewed a task loss prepared by Jerry Hardin. Of the 19 unduplicated tasks on the list, Dr. Hendricks opined claimant was unable to perform 5 for a 26 percent task loss.[7] Dr. Hendricks was asked to assume claimant had restrictions in place prior to her July 31, 2008 accidental injury and that such restrictions were no lifting over 15-20 pounds, limited twisting and turning, and not to push or pull any heavy objects. Dr. Hendricks testified that all of the tasks he indicated claimant could not do as a result of her July 31, 2008 accidental injury would already have been tasks she probably should not do or likely should not have performed before her 2008 injury based on such prior hypothetical restrictions.

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[6] Hendricks Depo. at 16.

[7] Judge Klein's calculation of Dr. Hendricks' task loss percentage opinion uses all 21 tasks on Mr. Hardin's task list. However, two tasks were duplicated. Claimant's task loss percentage should be based on the 19 remaining and unduplicated tasks.

Dr. Do testified on November 17, 2010. Dr. Do agreed claimant had a chronic back problem dating back to at least 2001. He testified the radiologist report for the 2006 MRI showed a large central herniated disk at L5-S1 and slight bulging of L4-L5. Dr. Do testified that the same radiologist indicated the 2009 MRI showed moderate degenerative disc disease with a small to medium size central disk herniation at L5-S1, a minimal right paracentral disk herniation at L4-L5, and mild facet joint hypertrophy without significant spinal canal stenosis.[8] Dr. Do testified the March 23, 2009 MRI showed no significant changes from the May 13, 2006 MRI: "It's definitely not exact science. Her MRI in 2009, for all intents and purposes, is the same as 2006."[9]

Dr. Do testified claimant's 2008 injury "at least would have aggravated, accelerated or make more active" her preexisting low back condition.[10] Dr. Do twice more agreed that the 2008 injury resulted in an aggravation of the claimant's preexisting condition before stating, "If I may, I don't know if this is oversimplifying things, [Ms. Spigarelli], but we all agree [claimant] had back pain that's at least aggravated or accelerated by her work injury. If you look at her current complaints, without even a 2006 MRI, let's just agree at a minimum she has a muscle strain. I think we can all agree to that."[11] Dr. Do testified the 2008 work accident increased claimant's disability.

Dr. Do testified the restrictions he provided claimant were for her July 31, 2008 accidental injury. Using his restrictions, Dr. Do opined claimant was unable to perform 7 of 19 unduplicated tasks in Mr. Hardin's task list for a 37 percent task loss. Dr. Do was asked to assume claimant had restrictions prior to July 31, 2008 consisting of no lifting over 15-20 pounds, limited twisting and turning and not to push or pull heavy objects. Based on such assumed facts, Dr. Do testified that all of the tasks he indicated claimant could not perform after the July 31, 2008 accidental injury were tasks she should not have performed or could not perform prior to her accidental injury.

Both Dr. Hendricks and Dr. Do testified different doctors can view and interpret MRI films differently.[12]

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[8] Both reports from the radiologist, Donald C. White, M.D., were admitted into evidence without objection at Dr. Do's deposition.

[9] Do Depo. at 33.

[10] *Id.* at 28.

[11] *Id.* at 29.

[12] Hendricks Depo. at 17; Do Depo. at 24.

PRINCIPLES OF LAW

The claimant has the burden of proof to establish by a preponderance of credible evidence his or her right to an award of compensation.[13] K.S.A. 2008 Supp. 44-508(g) states, "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The existence, nature and extent of a claimant's disability is a fact question.[14] A claimant's testimony alone is sufficient evidence of his or her physical condition.[15] Medical evidence is not essential to establish the existence, nature and extent of a claimant's disability.[16] The trier of fact is not bound by medical evidence and must make its own determination of claimant's disability based on all the evidence, including deciding which testimony is more accurate and may adjust the medical, layperson and other testimony relevant to the question of disability.[17]

A claimant shall not recover for the aggravation of a preexisting condition, except to the extent the work-related injury causes increased disability; any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[18] It is respondent's burden to prove claimant's preexisting impairment.[19] Any preexisting functional impairment must be determined utilizing the *Guides*.[20]

K.S.A. 2005 Supp. 44-508(e) states, in part:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.

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[13] K.S.A. 2008 Supp. 44-501(a).

[14] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[15] *Graff v. Trans World Airlines*, 267 Kan. 854, 863-64, 983 P.2d 258 (1999).

[16] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 784, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[17] *Id.* at 784-86.

[18] K.S.A. 2008 Supp. 44-501(c).

[19] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[20] *Webb v. Rose Villa, Inc.*, No. 1,047,270, 2012 WL 2890460 (Kan. WCAB Jun. 4, 2012).

K.S.A. 44-510e(a) provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

A work-related aggravation, acceleration or intensification of a preexisting condition is compensable.[21]

"When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction."[22]

An employee's work disability award is calculated under K.S.A. 44-510e(a) by averaging the employee's post-injury wage loss and task loss percentages. The reason for the employee's post-injury wage loss is irrelevant.[23] Kansas law in effect at the time of claimant's accidental injury did not require any nexus between the wage loss and the injury; rather, calculation of wage loss is just a mathematical equation.[24]

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[21] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 589, 257 P.3d 255 (2011).

[22] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676, 678 (2009).

[23] *Id.* at 608-10.

[24] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197, 1201 (2010).

ANALYSIS

Claimant sustained a compensable aggravation of a preexisting condition. Dr. Do, respondent's expert, testified several times that claimant sustained an aggravation of a preexisting condition. Under pre-May 15, 2011 Kansas law, an aggravation, acceleration or intensification of a preexisting condition is all that is required for compensability.

Functional Impairment

Claimant had some preexisting permanent low back impairment and new permanent impairment due to the July 31, 2008 accidental injury.

Dr. Do's estimation that 70 percent of claimant's overall 10 percent functional impairment preexisted her July 31, 2008 accidental injury is not based upon the *Guides*. Dr. Do's testimony that claimant sustained at least a low back strain and perhaps a 5 percent functional impairment due to the July 31, 2008 accidental injury is based upon the *Guides*, as is his opinion that claimant had an overall 10 percent functional impairment when accounting for both her pre-injury status and her post-injury status.

The Appeals Board finds claimant had a 5 percent functional impairment to the body as a whole preexisting her July 31, 2008 accidental injury and an additional 5 percent functional impairment to the body as a whole due to her July 31, 2008 accidental injury. Therefore, claimant sustained an additional 5 percent functional impairment as a result of her 2008 aggravation of a preexisting condition.

Dr. Hendricks only evaluated claimant once. His rating was based on claimant's presentation in late-November 2008. Claimant was not at maximum medical improvement at that time and thereafter received treatment from Dr. Do. Dr. Hendricks' 13 percent rating, provided approximately 15 months after he evaluated claimant, is rejected.

Even if there was no change between the 2006 and 2009 MRI studies, such identifiable change is not needed for compensability. K.S.A. 2008 Supp. 44-508(e) states it is not necessary that an injury have external or visible proof of existence. Both testifying physicians indicated claimant had an aggravation of a preexisting condition.

Work Disability

Claimant is entitled to a work disability award. A work disability award is permanent partial general disability (PPD) in excess of claimant's functional impairment. A work disability award is based upon an average of claimant's task loss percentage and her wage loss percentage. *Bergstrom* makes it clear that claimant's actual post-injury wage loss is used in computing her wage loss percentage. In this case, claimant is unemployed. Therefore, her current post-injury wage loss is 100 percent.

While Drs. Do and Hendricks provided similar task loss opinions, the Appeals Board finds Dr. Do's task loss opinion and restrictions more persuasive. Dr. Do treated claimant on numerous occasions; Dr. Hendricks evaluated claimant once before providing restrictions over 20 months later without additional evaluation.

Claimant's task loss is a more complicated issue. Respondent set forth a logical argument that all of claimant's task loss pre-dated her accident based on restrictions imposed by Dr. Chillal, such that she had no task loss due to her July 31, 2008 accidental injury. However, this argument is not persuasive based on three main factors.

First, Kansas law does not provide an offset for prior task loss. The Appeals Board previously ruled that the task loss component of a work disability award should be reduced to account for preexisting restrictions.[25] However, such interpretation of the law was rapidly replaced by numerous Appeals Board rulings that Kansas law only allowed an award to be reduced by preexisting functional impairment.[26]

Second, it appears Judge Klein reduced claimant's task loss by 70 percent because Dr. Do opined that 70 percent of claimant's functional impairment preexisted. Kansas law does not indicate claimant's task loss percentage should be reduced based on the percentage of claimant's preexisting functional impairment.

Third, even if claimant had preexisting task loss, whether she could not perform such tasks before her 2008 accidental injury was not proven. Drs. Hendricks and Do were asked to assume claimant's prior restrictions included no lifting over 15-20 pounds, limited twisting and turning and not to push or pull heavy objects. Dr. Chillal did not testify and his restrictions, if they were ever reduced to writing, were not placed into evidence. While claimant's testimony concerning her prior restrictions was inconsistent, she ultimately testified that her prior restrictions did not preclude twisting, turning, pushing and pulling until after her July 2008 accident. Therefore, opinions from Drs. Do and Hendricks that claimant's task loss predated her 2008 accidental injury were based on the incorrect assumption that the prior restrictions included no twisting, turning, pushing and pulling. Their opinions are not persuasive, insofar as they are based on a faulty assumption.

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[25] *Converse v. ADIA Personnel Services*, No. 184,630, 1996 WL 754236 (Kan. WCAB Dec. 18, 1996).

[26] See *Carver v. Missouri Gas Energy*, No. 195,270, 1997 WL 569511 (Kan. WCAB Jul. 31, 1997); *Deming v. Total Petroleum, Inc.*, No. 206,402, 1998 WL 381537 (Kan. WCAB Jun. 26, 1998); *Oberzan v. Calibrated Forms Co., Inc.*, No. 261,781, 2005 WL 2181214 (Kan. WCAB Aug. 17, 2005) ("There is no credit or offset for preexisting restrictions or work disability. The statute is clear that all work tasks claimant performed during the 15-year period preceding the accident are to be considered in determining task loss."), *aff'd,* No. 95,227, 142 P.3d 338 (Kansas Court of Appeals unpublished opinion filed Sept. 15, 2006), *rev. denied* 283 Kan. 931 (2007); *Nibarger v. Boeing Company*, No. 268,671, 2007 WL 1390688 (Kan. WCAB Apr. 27, 2007).

Claimant has a 68.5 percent work disability based on the average of her 37 percent task loss and her 100 percent wage loss. This results in a $100,000 award.

Judge Klein ordered PPD benefits in excess of claimant's functional impairment during the time she continued to work for respondent and also after her layoff. Respondent argues claimant is not entitled to work disability benefits when she was still employed and earned at least 90 percent of her average weekly wage.

Respondent is correct that claimant is not entitled to PPD benefits in excess of her functional impairment when she was receiving at least 90 percent of her average weekly wage.[27] Claimant worked until February 26, 2009. The Appeals Board presumes claimant earned comparable wages until her layoff, insofar as claimant made no request for temporary disability benefits between the time of her injury and her layoff. Claimant was entitled to 20.75 weeks of PPD for her functional impairment. Such PPD payments were due and owing before claimant lost her job. Claimant was not entitled to work disability benefits while she was earning comparable wages through February 26, 2009.

Post-injury, claimant worked part-time at a gas station on Sundays from 8:00 a.m. until 2:00 p.m., until June 2009. While the record does not disclose claimant's rate of pay at the gas station, the Appeals Board concludes claimant's part-time gas station earnings were not 90 percent or more of her average weekly wage. Claimant was entitled to work disability benefits while she worked at the gas station and earned less than 90 percent of her average weekly wage.

Respondent argues claimant's receipt of unemployment benefits must be considered in calculating claimant's post-injury earnings to avoid wage loss duplication. No Kansas workers compensation statute addresses whether to reduce a claimant's post-injury earnings based on receipt of unemployment benefits. Reading such language into the Kansas Workers Compensation Act would be impermissible judicial blacksmithing.[28] Respondent cites no authority regarding why claimant's unemployment benefits should be counted as post-injury earnings. Unemployment benefits are not post-injury earnings.[29]

Claimant is owed weekly PPD benefits based on her 68.5 percent work disability starting February 27, 2009 and continuing until she is paid a total award not to exceed $100,000.

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[27] See *Stephen v. Phillips County*, 38 Kan. App. 2d 988, 990, 174 P.3d 452 (2008), *rev. denied* 286 Kan. 1186 (2008).

[28] See *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197, 1201 (2010).

[29] See *Anderson v. The Boeing Company*, No. 256,710, 2006 WL 3298920 (Kan. WCAB Oct. 31, 2006).

Medical Bills

Claimant requested payment of Dr. Null's chiropractic bills as authorized medical treatment. Judge Klein ruled such treatment was unauthorized and declined to order respondent to pay such bills. The Appeals Board does not find that respondent consented to claimant's chiropractic treatment or ignored its statutory duty to provide medical treatment for a known injury. Respondent was providing treatment through Dr. Sandhu, but claimant declined additional treatment because she disagreed with Dr. Sandhu's diagnosis of osteoporosis. Respondent is not responsible for payment of Dr. Null's bills.

CONCLUSIONS

(1) Claimant sustained a compensable aggravation of her preexisting low back condition. She had a 5 percent preexisting functional impairment and an additional 5 percent functional impairment due to her July 31, 2008 accidental injury.

(2) Claimant is entitled to a 68.5 percent work disability award based on her 37 percent task loss and 100 percent wage loss, but such amount is reduced to a 63.5 percent work disability to account for her 5 percent preexisting functional impairment. Respondent is not entitled to a credit for any asserted preexisting task loss. Claimant's part-time, post-injury earnings at a gas station do not impact her entitlement to work disability benefits. Claimant's post-injury receipt of unemployment benefits do not impact her entitlement to work disability benefits.

(3) Claimant is not entitled to payment of Dr. Null's bills as authorized medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award Nunc Pro Tunc of Administrative Law Judge Thomas Klein dated August 9, 2012, is modified to find that for the period of July 31, 2008, through February 26, 2009, claimant is limited to her functional impairment of 10 percent, less a 5 percent preexisting impairment, for a permanent partial disability of 5 percent.

For the period beginning February 27, 2009, claimant is entitled to a work disability of 68.5 percent, less 5 percent preexisting impairment, for a permanent partial disability of 63.5 percent.

Claimant is entitled 20.75 weeks of permanent partial disability compensation at the rate of $408.40 per week or $8,474.30 for a 5 percent functional impairment, followed by 224.11 weeks of permanent partial disability compensation at the rate of $408.40 per week or $91,525.70 for a 63.5 percent work disability, making a total award of $100,000.

As of January 4, 2013, there would be due and owing to claimant 20.75 weeks of permanent partial disability compensation at the rate of $408.40 per week in the sum of $8,474.30 plus 201.14 weeks of permanent partial disability compensation at the rate of $408.40 per week in the sum of $82,145.58 for a total due and owing of $90,619.88, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $9,380.12 shall be paid at the rate of $408.40 per week for 22.97 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Hon. Thomas Klein, Administrative Law Judge